

Precise Voting, LLC

**Issue for Consideration: Source Code Escrow and/or Disclosure
New York State Election Law Section 7-208
Submitted by: Precise Voting, LLC**

Precise Voting, LLC ("Precise") respectfully requests that the analysis of the application of New York State Election Law §7-208 be conducted by first performing a systematic review of the plain meaning of the statute in question. This is the appropriate place to begin the inquiry as the Supreme Court of the United States has consistently held that when reviewing a statute each word in the statute should have its plain meaning ascribed to it. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1988) (The Supreme Court in reviewing a bankruptcy statute held that in reviewing a statute, as long as the statutory scheme is coherent and consistent there is no reason to go beyond the plain language of the statute to deduce the meaning of the statute under review.)

The relevant provision of the statute in question provides as follows:

...the manufacturer and/or vendor of such voting machine, system or equipment shall place into escrow with the state board of elections a complete copy of all programming, source coding and software employed by the voting machine, system or equipment which shall be used exclusively for purposes authorized by this chapter.....

New York State Election Law §7-208 (1).

The first inquiry in analyzing the statute must be: To whom does the statute apply? This question is easily answered from the statute itself. The statute applies to the "manufacturer and/or vendor" of a voting machine, a voting system or voting equipment. Consequently, the statute does apply to Precise as the manufacturer and vendor of a voting machine and voting software.

Logically, the second stage of the inquiry is: What obligation does the statute place on the manufacturer or vendor of a voting machine or voting software or voting equipment? The answer to this question is also found squarely in the plain meaning of the words of the statute. The statute

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provides that the manufacturer or vendor must place in escrow (i) a complete copy of all programming (ii) the source codes used to operate the voting system and (iii) software employed by the voting machine.

Up until now the dispute has confused the issue by combining the three items that the manufacturer and/or seller is required to escrow rather than treating them as the three separate and distinct items that the statute provides for, specifically, requiring the manufacturer to provide the source codes for the programming. This is not what the statute says.

As a manufacturer of a voting machine and developer of propriety voting software, Precise is the only entity that has the right to provide the proprietary source code information to the Board of Elections. Precise has always been, and remains ready willing and able to provide the Board of Elections with the proprietary source codes and voting source codes used to carry out the "purposes authorized" by this provision of the Election Law, specifically, the voting by electronic means.

Precise is not however, the manufacturer and/or seller of the operating system that enables the voting machine to run the proprietary software. The operating system is nothing more than a program purchased from a third party. In this case the third party is Microsoft. Precise, however, is still in a position to comply with the plain meaning of the statute. Precise is able to provide the Board of Elections with a copy of the operating program.

This reading of the statute that applies the plain meaning to the words of the statute is the only reading that makes sense given the other prevailing federal laws implicated in the arena of intellectual property. When the courts of the state of New York have been asked to review this issue they have consistently held that a source code was a protectable trade secret, and as such source codes are not accessible to the public. *Tradescape.com v. Shivaram*, 77 F.Supp. 2d 408 (S.D.N.Y. 1999).

Additionally, it is notable that this statute does not apply to a third party entity such as Microsoft as Microsoft is neither a manufacturer and/or vendor of a voting machine, a voting system or voting equipment and thus, the New York State Board of Elections has no authority upon which to base its request to such a third party escrow its proprietary information.

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The final step in the analysis must be: What is the statute designed to do? The answer to this question is found in sub-section (2) of §7-208. This section contemplates a challenge of the election results. In the event of such a challenge the relevant portion of this part of the statute provides that the manufacturer or vendor of the voting machine or software

“waive all rights to assert intellectual property or trade secret rights in any court of competent jurisdiction hearing the challenge to the results of any election....”

Thus, the statute itself tells us that it is designed to make it possible for a court to conduct a hearing on the challenges, the efficiency, effectiveness and accuracy of the votes recorded by a voting machine. Precise agrees that such a challenge may require an inquiry into the functioning of the voting machine software and this would require access to the source codes employed by the voting machine software. Such a challenge would not require the same review and analysis of the Microsoft program that works as the operating system for the voting machine. All that would be required in such a challenge is the ability to run the operating program and this can be accomplished with the provision of an operating disk.

In closing, Precise is prepared to comply with the plain meaning of §7-208 of the New York State Election Law and escrow with the Board of Elections (i) an operating disk for the programming system that runs the machine; (ii) the source codes for its proprietary software; and (iii) a copy of the propriety software.